...ART
PREME COURT, U. S.

73-749

Supreme Court, U. S.
FILED
DEC 7 1973
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

NO. 749

LAWRENCE N. ADLER, Petitioner

v.

THE MONTEFIORE HOSPITAL ASSOCIATION OF WESTERN PENNSYLVANIA, Respondent

ANSWER TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

MARCUS AARON II
BERKMAN RUSLANDER POHL
LIEBER & ENGEL
20th Floor Frick Building
Pittsburgh, Pennsylvania 15219
Attorneys for Respondent

Of Counsel:

ROBERT ENGEL
ALAN A. GARFINKEL
CHARLES B. GIBBONS

Financial Press Corporation, Pittsburgh (412) 391-2063

INDEX

	Page
Jurisdiction	1
Counterstatement of Questions Presented	2
Counterstatement	
Introduction	3
Procedural Background	4
Factual Background	5
Reasons for Denying the Writ	
Summary of Argument	10
Argument	12
I. There is No Violation in This Case of the Substantive or Procedural Requirements of the Fourteenth Amendment Due Process Clause	12
II. Respondent Hospital's Policy of Limiting the Use of its Laboratory to the Full-Time Director Does Not Deny Petitioner's Right to Equal Protection of the Laws	17
III. Respondent's Policy Does Not Interfere With the Patient's Right to Be Treated By the Physician of his Choice	20
Conclusion	23

TABLE OF CITATIONS

Page

Cases:

Benell v. City of Virginia, 258 Minn. 559, 104 N.W. 2d 633 (1960) 19,20

Blank v. Palo-Alto-Stanford Hospital Center, 234 Cal. App. 2d 377, 44 Cal. Rptr. 572 (1965) 19

Board of Regents of State College v. Roth, 408 U.S. 564 (1972) 15

Brown Shoe Co. v. United States, 370 U.S. 294 (1962) 2

Doe v. Bolton, 410 U.S. 179 (1973) 22

Eisenstadt v. Baird, 405 U.S. 438 (1972) 15

Griswold v. Connecticut, 381 U.S. 479 (1965) 22

Letsch v. Northern San Diego County Hospital District, 246 Cal. App. 2d 673, 55 Cal. Rptr. 118 (1966) 19

Lochner v. New York, 198 U.S. 45 (1905) 15

McGowan v. Maryland, 366 U.S. 420 (1961) 18

Meyer v. Nebraska, 262 U.S. 390 (1923) 13,14

Nebbia v. New York, 291 U.S. 502 (1934) 15

Roe v. Wade, 410 U.S. 113 (1973) 22

Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972) 18

In the
Supreme Court of the United States

OCTOBER TERM, 1973

NO. 749

LAWRENCE N. ADLER, Petitioner

v.

THE MONTEFIORE HOSPITAL ASSOCIATION OF WESTERN PENNSYLVANIA, Respondent

ANSWER TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

The Respondent, The Montefiore Hospital Association of Western Pennsylvania, respectfully prays that the petition for a writ of certiorari to review the opinion and judgment of the Supreme Court of Pennsylvania entered in this proceeding on July 2, 1973, be denied.

JURISDICTION

Respondent and Petitioner stipulated in the state courts that by reason of Respondent's affiliation with a state-related university and financial support from the Commonwealth of Pennsylvania and the Federal Government, it was a public institution whose actions and conduct were "state actions" within the meaning of the Fourteenth Amendment.

While Respondent does not wish to denigrate that to which it voluntarily agreed, it nevertheless harbors grave reservations about the ability to stipulate to the jurisdiction of this constitutional Court and is especially mindful of this Court's statement in *Brown Shoe Co. v. United States*, 370 U.S. 294, 305 (1962) that "the mere consent of the parties to the Court's consideration and decision of the case cannot, by itself, confer jurisdiction on the Court."

COUNTER STATEMENT OF QUESTIONS PRESENTED

1. May an advanced university-affiliated teaching hospital deny the use of its cardiac catheterization laboratory without a hearing to a staff cardiologist whom it formerly employed as part-time director of the laboratory and who now seeks to use the laboratory solely in his private capacity without denying substantive or procedural due process or equal protection of the laws when:

A) The right of the hospital to terminate his employment and hire a full-time director is admitted;

B) The cardiologist, during his tenure initiated, advocated and supported the hospital's policy of excluding all other cardiologists but the director from performing procedures in the laboratory;

C) The policy of the hospital in limiting the performance of procedures in its laboratory to the employed, full-time cardiologist is based upon considerations of improved patient care, promotion of good teaching and sound hospital administration;

D) The cardiologist has not had his privileges of staff membership reduced; and,

E) The cardiologist retains the right to treat his patients in the hospital on the same basis as other staff cardiologists?

(Answered in the affirmative by the Court below)

2. Are the constitutional rights of a patient infringed by a hospital regulation limiting the performance of procedures in its laboratory to the full-time director of that laboratory?

(Answered in the negative by the Court below)

COUNTERSTATEMENT OF THE CASE

Introduction

This is an action in equity instituted in the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division, in which Petitioner, a former employee of the Respondent Hospital, sought to compel the Hospital to permit him to use expensive, intricate and technical facilities of its Cardiac Catheterization Laboratory (hereinafter referred to as the "Laboratory"), for his own personal use and profit, which facilities he had previously been employed to direct and operate, on an exclusive basis, for the Hospital.

Petitioner in this action is now asking this Honorable Court to ignore the carefully considered opinions of the Chancellor and the Pennsylvania Supreme Court and substitute its judgment for that of the Hospital's Board of Trustees and its duly designated agents to overturn a rule which Petitioner himself instituted, encouraged and supported and which operated for his benefit during his years as an employee. Now admitting the Hospital's right to terminate his employment and replace him with another physician, Petitioner suddenly finds those same rules with which he lived for so many years, benefiting him and excluding others, to be somehow fraught with constitutional difficulties.

Procedural Background

On May 28, 1970, Petitioner's motion for a preliminary injunction was denied. (Appendix C. 31a) After extensive discovery, trial was held on Petitioner's request for a permanent injunction. On September 13, 1971, the Court of Common Pleas, Judge Frank R. Bolte, Chancellor, filed an adjudication which contained 55 findings of fact, 13 conclusions of law, a clear statement of the issues, and a well-reasoned discussion thereof. (Appendix D. 32a-67a) On the same date, the Court entered a Decree Nisi (Appendix D. 68a-69a) which denied Petitioner's request for a permanent injunction. Petitioner filed 62 exceptions to the adjudication and Decree Nisi (R. 1662a-1676a)* On December 10, 1971, the Court *en banc*, Bolte and McKenna J.J., filed an opinion (Appendix E. 70a-79a) and entered an order dismissing Petitioner's exceptions, affirming the adjudication and Decree Nisi and entered judgment for the Respondent. An appeal then followed to the Supreme Court of Pennsylvania which after an exhaustive review of the record sustained the decision of the lower court. (Appendix A. 1a-21a)

The trial court heard extensive testimony at both the preliminary and final hearings. It received into evidence the depositions in the case and was aided by a lengthy Stipulation of Facts. (Appendix F. 98a-107a) Also, the Court received into evidence, by stipulation of counsel, the reports of six internationally recognized experts on the subject of cardiac catheterization (R. 343a; 1313a-1336a; 1349a-1356a; 1363a-1368a), as well as the report of Dr. Donald N. Medearis, Jr., the Dean of the Medical School of the University of Pittsburgh. (R. 1326a-1332a)

---

*"R." indicates references to the printed record in the Supreme Court of Pennsylvania not printed in Petitioner's Appendix.

As noted in the opinion of the Court *en banc*, (Appendix E. 72a) Petitioner abandoned all of his specific exceptions to the 55 Findings of Fact in the Chancellor's Adjudication, all of which findings were amply documented by references to the record.

The abbreviated factual background presented by Petitioner ignores the record, glosses over essential facts stipulated by the parties and found by the Court below. Thus, to put the matter in proper prospective, a fuller statement is necessary.

Facts

Petitioner is a practicing cardiologist on the Active Medical Staff of Montefiore Hospital as well as three other Pittsburgh area hospitals. Additionally he maintains private offices at two widely separated locations in the Greater Pittsburgh area. (Stipulations of Fact, Nos. 13, 20, 21, Appendix F. 101a, 102a; Finding of Fact No. 1, Appendix D. 34a)

Respondent, Montefiore Hospital Association of Western Pennsylvania, is a Pennsylvania nonprofit corporation which operates the Montefiore Hospital in Pittsburgh. (Stipulation of Fact No. 4, Appendix F 98a; Finding of Fact No. 2, Appendix D. 34a)

Since 1957 Respondent Hospital has actively participated in the activities of the University of Pittsburgh School of Medicine. In December, 1969, Respondent became affiliated with the University's School of Medicine and other related schools in the health professions. It also became a Corporate member of the University Health Center. (Stipulation of Fact No. 8, Appendix F. 99a, 100a; Findings of Fact No. 4, Appendix D. 35a)

Respondent is presently organized on a departmental basis, with each of the departments of Medicine, Surgery, Radiology, Anesthesiology and Pathology having its own full-time chief physician. According to the By-Laws, Rules and Regulations of the medical staff of Respondent Hospital, the respective departmental chiefs have the responsibility for and authority over the administration, organization and conduct of all departmental activities throughout the Hospital. The Division of Cardiology and its laboratory are within the Department of Medicine. (Defendant's Final Hearing Exhibit B; Finding of Fact No. 5, Appendix D. 35a)

From July 16, 1963, until July 1, 1969, Petitioner was employed as the part-time salaried director of Respondent's Cardiac Catheterization Laboratory. (Stipulation of Fact No. 11, Appendix F. 100a; Finding of Fact No. 6, Appendix D. 35a) In his capacity as director, Petitioner performed all the intricate and risky procedures including Cardiac Catheterizations.* (Stipulation of Fact No. 14, Appendix F. 101a; Finding of Fact No. 15, Appendix D. 38a)

With the exception of cardioversions (which were performed by other cardiologists) and the installation of temporary and permanent pacemakers, all procedures performed in the Laboratory are diagnostic in nature. (Stipulation of Fact No. 16, Appendix F. 102a)

---

*Cardiac Catheterization involves the threading of a catheter through a patient's vein or artery into the heart in order to measure pressures. The placement of the catheter into the heart is done under fluoroscopic or image amplification control. Cineangiography is usually combined with catheterization and consists of injecting a contrast substance or material into an artery or cardiac chamber for the purpose of defining its anatomy and detecting organic difficulties. When the contrast material is injected, the image is recorded on X-ray movies or single X-ray film. Coronary arteriography is usually combined with left heart catheterization and involves the placement of a catheter into an artery, the injection of contrast material through the catheter, and the attempt to detect abnormal arterial conditions or deterioration. (Finding of Fact No. 9, Appendix D. 37a)

Concededly complex, cardiac catheterizations and related procedures are essentially team functions requiring such personnel as technicians and nurses in addition to the physician. (Finding of Fact No. 10, Appendix D. 37a)

The risks of potential complications from these procedures are varied, all stemming from the invasion of a foreign body into the coronary chambers, and the effect of the generalized procedure upon the patient.* There is agreement among members of the medical profession that considerable risk is involved although the exact magnitude is subject to some difference of opinion. Because of potential complications, there is a need for monitoring and close observation for several hours after the conclusion of the procedure. (Finding of Fact No. 11, Appendix D. 37a)

Except in cases of emergency, Petitioner as Respondent's employee-Director of the Laboratory, was the only cardiologist on Respondent's staff who performed cardiac catheterizations and related procedures both on his own patients and on patients referred to the Laboratory by other physicians even though there were four other cardiologists on the staff of Respondent Hospital who were capable of performing these techniques. (Stipulation of Fact No. 17, Appendix F. 102a; Findings of Fact Nos. 17, 18, Appendix D. 38a-39a)

In 1967 when another qualified staff cardiologist requested permission to perform these procedures, the request was refused on Petitioner's recommendation. Petitioner's reasoning, still valid today, was that physician competence

---

*Death, serious arrythmias, profound hypotension, complications involving the arterial system, accidental perforation of the heart, serious infections, bleeding and allergic reactions, embolisms, and cardiac complications are some of the major complications which can arise as a result of cardiac catheterizations and related procedures. (Finding of Fact No. 12, Appendix D. 38a)

can be maintained only by the performance of three cardiac catheterizations per week, and in a low volume laboratory such as Respondent's, this can be assured only by restricting performance to the full-time director. (R. 560a. 561a, 572a-575a, 1400a, 1401a)

Contemporaneously with Petitioner's employment by Respondent, he was appointed to the Active Medical Staff of its Department of Medicine and continues to be a member thereof, with all the rights and privileges accorded to every other physician on the staff. (Stipulation of Fact No. 13, Appendix F. 101a; Finding of Fact No. 7, Appendix D. 36a)

Petitioner had a dual relationship with Respondent during his tenure as Laboratory Director. First, as Director, Petitioner was a part-time employee performing cardiac catheterizations and related procedures and administering the affairs of that unit. Second, he was a cardiologist engaged in private practice on the Active Medical Staff with all privileges attendant thereto. However, it was understood that his employment as Director and compensation therefore were separate and distinct from his privileges and private practice as a Staff Physician. (Finding of Fact No. 8, Appendix D. 36a-37a)

In April, 1969, Petitioner was notified that his part-time employment would be terminated on July 1, 1969 when a full-time Director would assume responsibility for the Laboratory. (Stipulations of Fact Nos. 31, 32, Appendix F. 104a; Findings of Fact Nos. 41, 42, Appendix D. 47a, 48a) It was conceded in the lower court that Respondent had the right to discharge Petitioner and hire a full-time cardiologist to perform procedures in the Laboratory. (Stipulation of Fact No. 36, Appendix F. 105a; Finding of Fact No. 44, Appendix D. 48a; Stipulation of Fact No. 35, Appendix F. 105a; Finding of Fact No. 43, Appendix D. 48a)

The establishment of the Laboratory in 1963, its subsequent expansion, and finally its restructuring on a full-time basis in 1969 were part of the evolution of Respondent from a community hospital to a major teaching institution responsible for the training of medical students of the University of Pittsburgh's School of Medicine. (Finding of Fact No. 22, Appendix D. 40a) Contemporaneously with these changes, many of the physicians employed on a part-time basis to direct the specialty units or laboratories such as the Thyroid and Nuclear Medicine Unit, the Gastroenterology Unit and Renal Unit were replaced with full-time physicians. After the part-time employees were replaced, they were no longer permitted to perform the specialized procedures pertaining to their units, even though they continued to be fully qualified to do so. (Findings of Fact Nos. 38, 19, Appendix D. 46a, 47a)

Under the full-time Director of the Laboratory, the policy of limiting performance of procedures to the Director which had been established and maintained during Petitioner's tenure, was continued. (Stipulation of Fact No. 37, Appendix F. 105a; Finding of Fact No. 47, Appendix D. 48a-49a) This policy, though now operating to exclude Petitioner, is an accepted hospital practice in major University-affiliated teaching hospitals and is amply justified by considerations of patient care, teaching and efficient hospital administration, all of which are delineated in the adjudication, (Findings of Fact Nos. 48-50, Appendix D. 49a-52a) and in the opinion of the Supreme Court of Pennsylvania. (Appendix A. 6a)

At the termination of his Laboratory Directorship, Petitioner became the salaried part-time chief of Respondent's Coronary Care Unit where he exercised a similar type of exclusive authority. (Finding of Fact No. 47, Appendix D. 48a-49a) He was so employed until March 1, 1970, when he was relieved of that responsibility for failure to follow the

rules, attempts to subvert the system by performing Laboratory procedures in unauthorized places and at unauthorized times, failure to fulfill his teaching commitments and failure to return expensive hospital equipment he had removed from the premises. (Transcript of Final Hearing, R. 527a-529a; Defendant's Final Hearing Exhibits C, D, E.; Finding of Fact No. 45, Appendix D. 48a)

Petitioner waited eight months before requesting a hearing before the Joint Conference Committee of the Hospital, which request for the first time alleged a reduction of privileges. Moreover, Petitioner did not question his inability to perform procedures in the Laboratory until well after his employment as Director of the Coronary Care Unit was in jeopardy. (Finding of Fact No. 55, Appendix D. 52a) This request for a hearing was denied on grounds that his right to perform procedures was solely an incident of his prior employment and not of his Staff membership, and involved no deprivation of any staff privileges possessed by Respondent or any other cardiologist on the Staff. (R. 594a 595a; Plaintiff's Preliminary Hearing Exhibits 6, 7, 8; Findings of Fact Nos. 51-53, Appendix D. 52a)

REASONS FOR DENYING THE WRIT

Summary of Argument

The policy of a university-affiliated, advanced teaching Hospital limiting the performance of procedures in its Cardiac Catheterization Laboratory to the full-time Director employed by the Hospital does not violate the substantive requirements of the Due Process or Equal Protection Clauses of the Fourteenth Amendment. Substantial and undisputed evidence demonstrated that this policy, which represents a delicate balancing of the interests of patients, doctors and medical students, improves patient care, promotes better teaching and more efficient administration.

The laboratory procedures in question, much like X-ray procedures, represent only a small segment of Petitioner's cardiology practice, are diagnostic in nature and in no way infringe on either the physician's right to prescribe for and treat his patient or the concomitant right of the patient to be treated by a physician of his choice.

There has been no deprivation of procedural Due Process. During the time Petitioner was employed part-time as Director of Respondent's Laboratory, he established and maintained the challenged policy. Petitioner's right to perform these procedures was based on this employment relationship. Petitioner has conceded that the Hospital had the right to terminate this employment and to hire a full-time Director. The Hospital was not required to grant Petitioner a hearing on its refusal to permit Petitioner to perform these procedures in its Laboratory since it had not deprived Petitioner of any right or privilege which he held other than in his capacity as an employee.

There has likewise been no deprivation of equal protection of the laws. Petitioner previously had a marked advantage over the other cardiologists on Respondent's staff by reason of his dual employee-staff status. He is in fact more equal than before, now being treated exactly like all other non-employee cardiologists whom he had previously excluded from the Laboratory. Petitioner's attempt to equate his position with surgeons was demonstrated to be inappropriate and certainly does not rise to the level of a constitutional issue. It also ignores the equality of his position with other former part-time heads of Respondent's specialty units who have similarly been replaced by full-time employees.

The Supreme Court of Pennsylvania exhaustively reviewed the findings of fact and conclusions of law of the Chancellor and Court *en banc* and clearly, completely and correctly dealt with the issues raised in this proceeding.

Argument

I. THERE IS NO VIOLATION IN THIS CASE OF THE SUBSTANTIVE OR PROCEDURAL REQUIREMENTS OF THE FOURTEENTH AMENDMENT DUE PROCESS CLAUSE.

The narrow issue presented to and decided by the Supreme Court of Pennsylvania was

> ". . . whether a private physician associated with a public teaching hospital is entitled to render what he considers comprehensive medical treatment to his patients by use of certain hospital facilities and equipment, or whether his claimed right to do so must yield to rules and regulations established by the hospital for its own effective administration and which forbid such use." 453 Pa. 60, 62 (Appendix A. 1a)

Petitioner is inaccurate in asserting at page 12 of his petition that the Supreme Court of Pennsylvania failed to recognize that a physician's right to practice his profession was a fundamental right deserving of protection. Petitioner's argument assumes that his right is absolute while both the trial court and the Pennsylvania Supreme Court recognized the equally important complex obligations and responsibilities of the Respondent in the total scheme of providing the best in patient care, teaching and administration (Appendix A. 13a) The Court further recognized that the performance of procedures within a cardiology laboratory, being essentially diagnostic in nature, does not interfere with the right of the physician to prescribe for and treat his patient. Although the laboratory procedures are performed only by the Director, the physician-staff member in the final analysis controls what is to be done, the interpretation of the tests and the treatment.

This Court adumbrated the perimeters of permissible occupational regulation in *Meyer v. Nebraska*, 262 U.S. 390 (1923) in which it was held that the right to engage in any of the common occupations of life was a liberty which "may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect." 262 U.S. at 399, 400.

Petitioner's contentions were correctly viewed as a challenge of the means by which Respondent attempts to fulfill its function as a public teaching hospital. Any proper adjudication would therefore have had to concern itself with measurements of arbitrariness, real and substantial relationship and overbreath, which the opinions rendered properly did.

The determination made below was that the Hospital's regulation was a reasonable means of achieving the legitimate ends of providing optimal patient care, academic excellence in its teaching program and efficient internal administration. (Appendix A. 13a)

Based on voluminous expert testimony the lower Court found the challenged policy helped to achieve this tripartite objective in the following ways: (1) as the procedures are essentially team functions, the members are able to develop a routine as well as a familiarity with the equipment and its utilization by a particular physician; (2) full-time presence at the Hospital by the operator permits optimal patient care because complications can be treated by the physician who performed the procedure; (3) physician competence can be maintained only by the performance of at least three cardiac catheterizations per week, and in a low volume laboratory such as Respondent's this can be assured only by restricting performance to the full-time Director; (4) a full-time physician-director has the extra time necessary to teach effectively

the many medical students, interns and residents who utilize the Laboratory as a basic learning tool; (5) scheduling problems are reduced when it is not necessary to attempt to accommodate practitioners on the staff who have outside commitments; (6) procedures should be scheduled when possible in the morning so that the performing physician can be available in the afternoon should complications arise; (7) a full-time director insures that the non-professional but essential administrative details of operating a laboratory will be performed by a physician; were the director's volume of procedures reduced by allowing others to perform them, it would be extremely difficult to obtain a qualified cardiologist willing to assume the administrative functions; (8) equipment breakdowns and lack of reliability are minimized by limiting equipment utilization to a single physician; and (9) Respondent has a substantial and legitimate interest in insuring the optimal performance of its employees and use of equipment because it is liable for negligently caused injuries. (Appendix D. 50a-52a; Appendix A. 6a)

In the loose conglomeration of generalities addressed to this Court it is difficult to determine precisely what quarrel meriting this Court's consideration Petitioner has with the Supreme Court of Pennsylvania's treatment of the substantive due process issue other than the fact that the Court did not sustain his position.

In Respondent's view, either the Petitioner is asserting that his right to practice medicine is absolute in the sense that it cannot be circumscribed by any restriction, however reasonable, or he wishes this Court to substitute its judgment concerning policy and good practice for that of the hospital administrators.

The former position does not comport with the doctrine of the *Meyer* case, supra, and is untenable. By urging this Court to embrace the latter position, Petitioner would

"regrettably hark back to the heyday of substantive due process." *Eisenstadt v. Baird*, 405 U.S. 438, 467 (1972) (dissenting opinion of Burger, C.J.) and resurrect decisions such as *Lochner v. New York*, 198 U.S. 45 (1905) and *Nebbia v. New York*, 291 U.S. 502 (1934) in which the Court evinced willingness to substitute its judgment for that of the duly constituted federal and state legislatures and public authorities.

Petitioner's claim that he was denied procedural due process by the Hospital's refusal to accede to his request for a hearing is equally without merit.

The prior authority to perform these procedures stemmed solely from Petitioner's employment position and not from his membership on the medical staff of the Cardiology Department. In point of fact, except for emergencies, no cardiologist other than the director has ever held privileges in the Laboratory. (Stipulations of Fact Nos. 17, 37 Appendix F. 102a, 105a; Findings of Fact Nos. 17, 18, 46, 47, Appendix D. 38a, 39a, 48a, 49a)

In its recent decision of *Board of Regents of State College v. Roth*, 408 U.S. 564 (1972) this Court, confronted with a similar due process claim of a non-tenured college professor who had been denied re-employment for the following year, said in pertinent part:

> "The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits . . . . To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it . . . . Property interests, of course, are not created by the Constitution. Rather, they are created

> and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits . . . ." 408 U.S. at 576-577.

As the Pennsylvania Supreme Court correctly pointed out, Petitioner's rights to admit patients, to prescribe treatment, and indeed the full range of privileges accorded to all staff members have in no way been diminished, but remain in all respects equal to those of other staff members. Hence the claim of a denial of procedural due process is based on nothing more than a "unilateral expectation". (Appendix A. 20a)

Moreover Respondent's By-laws do not sustain the alleged claim of right to a hearing. Subsection I of Article III, Section V of the Medical Staff By-laws reads:

> "In any case where reappointment is not recommended or where reduction of privileges is recommended the Executive Director shall notify the physician or dentist concerned and he shall be given an opportunity to appear before the Joint Conference Committee." (Exhibit 3 to Stipulation of Fact No. 10 Appendix A. 20a)

With respect to his employment, there was no reason for a hearing since Petitioner stipulated and agreed that not only did Respondent have a right to hire a full-time Director of the Laboratory but also that Respondent had an unqualified right to terminate Petitioner's part-time employment. (Stipulations of Fact Nos. 35, 36; Appendix F. 105a)

Since staff privileges had not been reduced nor reappointment denied, a hearing before the Joint Conference Committee was not mandated, due process was not denied, nor any constitutional right of Petitioner violated.

II. RESPONDENT'S POLICY OF LIMITING THE USE OF ITS LABORATORY TO THE FULL-TIME DIRECTOR DOES NOT DENY PETITIONER'S RIGHT TO EQUAL PROTECTION OF THE LAWS.

Petitioner's second argument asserts that the Hospital's policy of restricting the access of staff cardiologists to the cardiac catheterization laboratory while permitting staff surgeons unlimited use of the operating rooms violates the Equal Protection Clause of the Fourteenth Amendment.

This contention rests on what Respondent amply demonstrated was a fallacious analogy between the performance of cardiac catheterizations and general surgical procedures. As noted in the opinion of the Supreme Court of Pennsylvania, the report of Dr. Richard Gorlen, Chief of the Cardiovascular Division at Peter Bent Brigham Hospital, Boston and Associate Professor of Medicine at Harvard Medical School introduced at trial stated:

> "An analogy is often erroneously made with a surgical operating team: during general surgery, however, the number of maneuvers are stylized and set for each team member such as Operating Nurse and apply to all participating doctors. In a catheterization laboratory the number of technicians, nurses, etc. is multiple and varying in applications – doctor idiosyncrasy is greater including type of equipment and its operation, modes of physiological measurement or of angiographic data retrieval. Furthermore, patient crises are manifold running the gamut from pain and discomfort to cardiac arrest and death." (Appendix A. 18a)

Dr. James Leonard, Professor of Medicine at the University of Pittsburgh Medical School and Chief of Cardiology at Presbyterian-University Hospital, also debunked this comparison. At trial of the issue Dr. Leonard stated:

> ". . . the tradition of what goes on in abdominal surgery, let's say, in terms of the structures and functions of the operating room versus the cardiac catheterization laboratory are entirely different . . . . the key to successful surgery would be the surgeon himself . . . The skill of the operator in a cardiac catheterization laboratory is only one small segment . . . of the entire need of a successful diagnostic catheterization laboratory." (R. 641a-642a)

In *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961) this Court said:

> "Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

Accepting the fact that when classifications approach sensitive and fundamental personal rights, this Court exercises a stricter scrutiny, *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 172 (1972), the differentiation inherent in the Hospital's policy still passes constitutional muster because the means selected were necessary to and substantially furthered legitimate and important purposes. The same impelling reasons which caused Respondent to adopt this policy simply do not obtain in the case of surgeons.

Petitioner also conveniently overlooks the fact that his situation more closely parallels the circumstance of other

former part-time heads of Respondent's specialty units, all of whom were exclusive in their domains, and all of whom, like Petitioner, were excluded after being replaced by full-time employees. (Findings of Fact Nos. 38, 39, Appendix D. 46a, 47a) Petitioner makes no complaint about the other cases, fails to distinguish his own, and utterly fails to show why the circumstance of the surgeons with its historic and functional differences is an appropriate parallel.

The "contractual" or "closed staff" operations policy has been litigated on several occasions in the state courts with the hospital's position being sustained each time against charges of discriminatory exclusion.

In *Benell v. City of Virginia*, 258 Minn. 559, 104 N.W. 2d 633 (1960) a municipal hospital hired a full-time radiologist and by resolution of the hospital committee limited the performance of X-ray procedures to this physician thereby preventing Dr. Benell, an active member of the medical staff and former part-time radiologist, from utilizing the facilities of that department.

The Supreme Court of Minnesota took special note of the facts that (1) the hospital was liable for negligence in connection with operation of the equipment in its radiology department, and (2) the American College of Radiologists advocated a closed staff policy as a practice calculated to best serve the interest of hospitals, patients and medical staffs generally. The Court found the policy neither arbitrary nor unreasonable saying it was "a phase of the steady advancement of specialization in various medical fields, designed to insure the safety of patients and to protect the hospital in the performance of its obligations to them". 104 N.W. 2d at 637. See also, *Blank v. Palo Alto - Stanford Hospital Center*, 234 Cal. App. 2d 377, 44 Cal. Rptr. 572 (1965) and *Letsch v. Northern San Diego County Hospital District*, 246 Cal. App. 2d 673, 55 Cal. Rptr 118 (1966).

Benell has particular bearing on the present case since Respondent occupies a similar position with regard to liability for negligent injury. Further, at trial, undisputed evidence was introduced which documented the fact that many major university-affiliated teaching hospitals limit the performance of procedures in their cardiac catheterization laboratories to full-time physicians. (Finding of Fact No. 49, Appendix D. 49a) Examples of these hospitals include the University of Pennsylvania, Duke University, Peter Bent Brigham Hospital at Harvard University, Hahneman Hospital, Stanford University Hospital, Johns Hopkins, Cornell Medical Center, Children's Hospital (Pittsburgh) and Presbyterian-University Hospital (Pittsburgh).

When this Court considers (1) that Respondent's classification is reasonable (2) that Petitioner was treated exactly like the other part-time employees heading specialty functions in Respondent's hospital who were replaced by full-time directors (3) that Petitioner has only been deprived of the unique economic advantage his dual status gave him vis a vis his fellow cardiologists and (4) that he is now precisely equal in his privileges and status to all other cardiologists on Respondent's staff, Petitioner's assertion of denial of equal protection will be found to evaporate entirely.

III. RESPONDENT'S POLICY DOES NOT INTERFERE WITH THE PATIENT'S RIGHT TO BE TREATED BY THE PHYSICIAN OF HIS CHOICE.

Petitioner's claim that the Respondent Hospital's policy interferes with his patients' right to be treated by the physician of their choice is a spurious one without foundation in fact or law.

As the Supreme Court of Pennsylvania pointed out in its opinion, 453 Pa. 60, 75 (Appendix A. 14a), there has been

no representation made of any dissatisfaction of Petitioner's patients with the challenged restriction.

Although the parties stipulated that since July 1, 1969 Petitioner has referred 27 patients to hospitals other than Respondent for procedures to be performed in their cardiac catheterization laboratories, (Stipulation of Fact No. 40, Appendix F. 106a), it should be noted Petitioner further stipulated that 17 of these patients were referred to Presbyterian-University Hospital which has a similar exclusionary rule preventing Petitioner, a staff member, from using its laboratory (Stipulations of Fact Nos. 41, 42, Appendix F. 106a), which rule Petitioner has accepted without question. (R. 190a)

As the trial and appeals courts correctly indicated in their respective opinions, the record fails to disclose any impairment of the physician-patient relationship. The Laboratory procedures are diagnostic in nature with the physician staff member ultimately controlling what is to be done and when; the interpretation of the tests and the treatment to be prescribed. An attending physician is permitted to observe the actual performance of the procedures and to monitor the patient afterwards.

The policy herein complained of is not unique in the modern practice of medicine. Under the regulations of Respondent and many other similar hospitals, the patient's own physician is not the operator in certain areas of diagnosis and care, including radiology, pathology, anesthesiology, the coronary care and nuclear medicine units as well as cardiac catheterization. All of the foregoing are services provided and controlled by this and similar hospitals to be utilized by staff members as they may see fit in treating their patients.

One of the primary desiderata in implementing this policy was optimal patient care. In his opinion, the Chancellor found as facts and enumerated the benefits of the

system (Appendix D. 49a-52a), indicating that this objective is thereby achieved.

It is submitted there is no conflict between the instant decision of the Supreme Court of Pennsylvania and either *Griswold v. Connecticut*, 381 U.S. 479 (1965) or *Doe v. Bolton*, 410 U.S. 179 (1973).

Both the *Griswold* and *Doe* cases involved absolute statewide prohibitions on the conduct of physicians which made it criminal for them to perform certain actions (dispense birth control information and devices; perform abortions) thus rendering it impossible for patients legally to receive this type of treatment and medical information. Respondent's policy, however, dictated as it is in major part by concern for the patient's well-being, is not in that genus of restrictions which have been found actively to thwart both a physician's efforts to treat his patient and the patient's efforts to obtain desired treatment.* There is nothing to prevent the Petitioner physician from performing these procedures in an unrestricted laboratory.

Petitioner has not been foreclosed from practicing as a physician or as a staff member of Respondent. Nor has he been deprived of anything which he or any other physician on the Active Medical Staff of Respondent, or the other major university teaching hospitals in the country, have been permitted to do as a result of their staff membership or privileges incident thereto. The Hospital's policy is a restriction in the most minimal sense because, as the Chancellor accurately

---

*As recently as *Roe v. Wade*, 410 U.S. 113 (1973), this Court recognized the propriety of reasonable regulation in this area when it said at pages 153-154:

> "The Court's decisions recognizing a right of privacy also acknowledge that some state regulation in areas protected by that right is appropriate. [A] state may properly assert important interests in safeguarding health [and] in maintaining medical standards."

observed, "The performance of these procedures is but a very small part of the total practice of cardiology." (Appendix D. 59a)

The claim of infringement of patient's rights evanesces under close scrutiny when the challenged policy is examined in the light of its desirable objectives of improved patient care, enhancement of the teaching program and efficient administration leaving only Petitioner's unspoken but suspected concern about his parochial and selfish economic interests which are affected by this policy.

CONCLUSION

Under the guise of glittering generalities Petitioner attempts to create constitutional issues where none exist. The Supreme Court of Pennsylvania accurately perceived the delicate balancing of interests which has occurred when it concluded:

> "Our decision merely recognizes the difficulty and complexity of the task facing a large hospital attempting to provide comprehensive medical services. Many of the procedures which in the past were performed by a physician of the patient's choice must today be handled by hospital-employed specialists. In light of such developments, the personal desires of persons such as Dr. Adler must yield to reasonable rules and regulations intended alike for the benefit of patients and their doctors, the university and its students, the hospital and the public it serves . . . . the regulations here in question were in fact reasonable." 453 Pa. 60, 82 (Appendix A. 20a-21a)

For the foregoing reasons, it is respectfully submitted that the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

MARCUS AARON II
BERKMAN RUSLANDER POHL
LIEBER & ENGEL
20th Floor Frick Building
Pittsburgh, Pa. 15219
Attorneys for Respondent

Of Counsel:

ROBERT ENGEL
ALAN A. GARFINKEL
CHARLES B. GIBBONS